UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 95-21-P-H***
	)	***(Civil No. 98-169-P-H)***
ALBERTO MORLA-TRINIDAD,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

Alberto Morla-Trinidad, appearing *pro se*, moves this court to correct his sentence pursuant to 28 U.S.C. § 2255. A sentence of 324 months was imposed following his conviction on charges of conspiracy to distribute and possession with intent to distribute a substance containing cocaine base, in violation of 21 U.S.C. §§ 841 and 846. Judgment (Docket No. 50) at 1-2. Morla-Trinidad contends that the court incorrectly applied certain sections of the United States Sentencing Commission Guidelines ("U.S.S.G.") to him, that the government failed to prove that the substance at issue was crack cocaine, and, to the extent that any of these claims should have been presented previously, "the issues could reach ineffective assistance of counsel, for failing to present or argue these matters to the trial court or appellate court." Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Petition") (Docket No. 68) at 6.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than

statements of fact.'" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citations omitted). In this instance, I find that the allegation cannot be accepted as true because they are contradicted by the record. Accordingly, I recommend that the motion be denied without an evidentiary hearing.

I. Background

As the First Circuit noted on Morla-Trinidad's direct appeal,

> the government presented six witnesses who testified about their involvement with Morla-Trinidad. Raul Baez testified that Morla-Trinidad initially sold drugs for him in Lawrence, [Massachusetts,] but then became interested in selling in Lewiston, [Maine,] another locale in which Baez conducted his drug business. Baez stated that although he rejected Morla-Trinidad's offer to become a partner in his Lewiston business, he did drive Morla-Trinidad to Lewiston to meet [Ruth] Peabody; to Baez's dismay, Morla-Trinidad then began to compete with him in the Lewiston drug trade.
>
> Most of the other witnesses testified that they saw Morla-Trinidad in Peabody's residence (where they bought crack cocaine), and/or that they bought the drug directly from Morla-Trinidad at that location. In particular, Marlane Driggers testified that she first met Morla-Trinidad in May 1994 in Lawrence, at which time she drove him to her apartment in Lewiston. She stated that he carried at least 200 bags of crack cocaine on that trip, intending that she sell it in Lewiston. Driggers testified that soon thereafter, she moved into Peabody's apartment out of which they sold crack cocaine. She indicated that Morla-Trinidad stayed in their living room at least three days a week and that, two or three times during each of those days, she would obtain from him a batch of twenty bags of crack cocaine to sell.
>
> Michael Lagasse . . . stated that Morla-Trinidad was at Peabody's residence at least two or three times per week and that he bought crack cocaine many times from Morla-Trinidad at that location. Three other witnesses . . . testified that they regularly purchased crack cocaine out of Peabody's apartment and that they either bought directly from Morla-Trinidad or they saw him there when they bought from Peabody.
>
> There was testimony to the effect that Morla-Trinidad would exchange crack cocaine for travel between Lawrence and Lewiston.

United States v. Morla-Trinidad, 100 F.3d 1, 2-3 (1st Cir. 1996).

On appeal, Morla-Trinidad challenged only an error in the district court's decision to allow the government to impeach his testimony with evidence concerning a prior arrest in which evidence was illegally obtained. *Id.* at 2. The First Circuit upheld the conviction. *Id*. at 7.

III. Discussion

Morla-Trinidad's motion is filed on the standard form for section 2255 motions, and he has signed it under penalty of perjury. Petition at 7. However, in that portion of the form that asks the petitioner to set forth the facts supporting his statement of grounds, Morla-Trinidad consistently refers to his Supplement to Motion to Vacate Set Aside or Correct Sentence ("Supplement"), which was filed with the motion but is not sworn. The government seeks summary dismissal of this proceeding because the factual bases for Morla-Trinidad's claims were not presented under oath, citing *United States v. LaBonte*, 70 F.3d 1396 (1st Cir. 1995), *rev'd on other grounds*, 117 S.Ct. 1673 (1997). Government Opposition to Motion to Vacate, Set Aside, or Correct Sentence ("Government Opposition") (Docket No. 71) at 20. Morla-Trinidad has responded by swearing to the Supplement in his Response to Government's Opposition (Docket No. 72) at 1.

The government's interpretation of *LaBonte* is correct, but Morla-Trinidad's belated oath, *see* Response to Government's Opposition ("Defendant's Response") (Docket No. 72) at 1, would sufficiently address this defect in his pleading if the oath were properly acknowledged. The document containing Morla-Trinidad's oath bears a stamp at the end, with blanks after the words "NAME" and "TITLE," followed by the words "AUTHORIZED BY THE ACT OF JULY 7, 1955 TO ADMINISTER OATHS (18 USC 4004)." The blanks are filled in with a signature and, in the

"title" space, the words "Case Manager." The cited statute provides: "The wardens and superintendents, associate wardens and superintendents, chief clerks, and record clerks, of Federal penal or correctional institutions, may administer oaths to and take acknowledgments of officers, employees, and inmates of such institutions, but shall not demand or accept any fee or compensation therefor." A case manager does not appear to be within the list of those authorized by the statute to administer oaths. Morla-Trinidad's Response does not include the alternative affirmation allowed under 28 U.S.C. § 1746. I am therefore unable to conclude that Morla-Trinidad has successfully remedied the defect in his submission to this court. In any event, it is unnecessary to resolve this matter on the basis of the requirement of sworn allegations, because Morla-Trinidad's motion fails on several other grounds.

The government next argues that Morla-Trinidad's claims are procedurally defaulted because they could have been raised on appeal but were not, citing *Knight v. United States*, 37 F.3d 769 (1st Cir. 1994). The claims concern application of the sentencing guidelines and the sufficiency of the evidence produced at trial, albeit as applicable only to sentencing, both of which could have been raised on appeal. *E.g., United States v. Kneeland*, ___ F.3d ___, 1998 WL 320931 (1st Cir. Jun. 23, 1998) at *9 (direct appeal from calculations under sentencing guidelines for sentence enhancement); *United States v. Lowe*, ___ F.3d ___, 1998 WL 256993 (1st Cir. May 27, 1998) at *5 (direct appeal raising issue of sufficiency of evidence). Such claims are not cognizable under section 2255.[1]

[1] Morla-Trinidad alleges that one of the errors he claims in application of the sentencing guidelines in his case rises to the level of constitutional violations. Supplement at 5. However, he fails to specify how a two-level enhancement for obstruction of justice based on his testimony at trial violates the First, Fifth, Sixth and Fourteenth Amendments. In the First Circuit, issues mentioned but not developed by the petitioner in a section 2255 proceeding will not be addressed by the court. *Argencourt v. United States*, 78 F.3d 14, 16 n.1 (1st Cir. 1996).

Knight, 37 F.3d at 772-73.

Assuming, without deciding, that Morla-Trinidad has appropriately raised a claim of constitutionally ineffective assistance of counsel based on the failure to make these claims on direct appeal, *but see Argencourt*, 78 F.3d at 16 n.1, Morla-Trinidad is still not entitled to a hearing. *Strickland v. Washington*, 466 U.S. 668 (1984), provides the applicable standard for assessing whether a defendant has received ineffective assistance of counsel such that his Sixth Amendment right to counsel has been violated. The defendant must show that his counsel's performance was deficient, i.e., that the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. The defendant must also make a showing of prejudice, i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The court need not consider the two elements in any particular order; failure to establish either element means that the defendant is not entitled to relief. *Id*. at 697. Counsel's performance cannot be deficient if the only "error" alleged is a failure to engage in a futile exercise. *Carter v. Johnson*, 131 F.3d 452, 464 (5th Cir. 1997).

The first claim that Morla-Trinidad contends his appellate counsel should have raised is that the three-level increase assigned by the court to his offense level pursuant to U.S.S.G. § 3B1.1(b) was improper because the others involved in the offense merely bought crack cocaine from him for their own use and thus were not "participants" in the criminal activity within the meaning of the guideline. The guideline at issue provides, in relevant part:

> **Aggravating Role**
> Based on the defendant's role in the offense, increase the offense level as follows:
> * * *
> (b) If the defendant was a manager or supervisor (but not an organizer

> or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by **3** levels.

U.S.S.G. § 3B1.1(b). The first Application Note to this section of the guidelines defines a "participant" as "a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense . . . is not a participant."

Morla-Trinidad was convicted of conspiracy to distribute and possession with intent to distribute crack cocaine. Six witnesses testified that they were involved in this conspiracy: Marlane Driggers, Transcript of Proceedings ("Trial Tr.") (Docket No. 55) at 9-11, 16, 22-23; Karla Schools, *id.* at 104-112; Michael Lagasse, *id*. at 126-28; Raul Baez, *id.* at 60-65; Bruce Moody, *id.* at 45-47; and Scott Poulin, *id*. at 87-91. Contrary to Morla-Trinidad's representation, these individuals did not testify that they only purchased crack cocaine for personal use, and it was clear from the testimony of at least four of these individuals[2] that Morla-Trinidad knew that they in turn were selling some of the crack cocaine that he provided to or received from them. E.g., Driggers, *id*. at 10-11, 17, 19-20, 22, 24; Lagasse, *id*. at 129-31; Schools, *id*. at 104-05, 107-08; Poulin, *id*. at 93. The numerosity requirement of section 3B1.1(b) was met by the evidence in this case.

Even if the numerosity requirement of section 3B1.1(b) had not been met, the alternative basis for its application, that the criminal activity be extensive, was established by the evidence. In *United States v. Reid*, 911 F.2d 1456 (10th Cir. 1990), a case cited by Morla-Trinidad, a drug conspiracy involving the defendant and three subordinates and relying on the knowing services of at least two drug suppliers to supply hundreds of customers over a three-week period was held to be

[2] For purposes of section 3B1.1(b), the defendant is to be counted as one of the five participants. *United States v. Preakos*, 907 F.2d 7, 10 (1st Cir. 1990).

extensive under section 3B1.1(b). *Id.* at 1465-66. I can discern no basis upon which the facts in *Reid* in this regard may be distinguished from those in this case.

The second issue raised by Morla-Trinidad concerns the two-level enhancement in his offense level imposed by the court at sentencing for obstruction of justice pursuant to U.S.S.G. § 3C1.1, which provides: "If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by **2** levels." Application Note 3 to this section includes in a non-exhaustive list of examples of the types of conduct to which this enhancement applies "committing . . . perjury." Here, the court increased the offense level for the following reason:

> Turn next to the question of obstruction of justice under 3-C 1.1 [sic], I sat at the trial and heard the defendant testify. I find by clear and convincing evidence, indeed I would find beyond a reasonable doubt, that the defendant perjured himself at that trial, perjured himself in connection with his testimony concerning his acquaintance and relationship with Marlane Driggers and with Ruth Peabody.
>
> At a very minimum those were both essential elements in the case. They were there for [sic] more than material. They reach the highest level of materiality and consequently, I increase by two levels under 3-C 1.1 [sic] for perjury.

Partial Transcript, Sentencing, at 4.

Morla-Trinidad contends that such an increase impermissibly chills a defendant's exercise of his right to testify, that the fact that he required an interpreter affected his testimony in some unspecified way, and that if he had known that the witnesses testifying against him had at some time prior to their testimony asserted their innocence, which was inconsistent with their testimony at trial, "perhaps the outcome would have been different and there would have been no obstruction." Supplement at 7.

Morla-Trinidad's first argument has been "conclusively put to rest" by the First Circuit. *United States v. Rojo-Alvarez*, 944 F.2d 959, 967 (1st Cir. 1991). *See also United States v. Dunnigan*, 507 U.S. 87, 88 (1993) ("An enhanced sentence for the willful presentation of false testimony does not undermine the right to testify.") The court, upon making a finding that Morla-Trinidad had committed perjury, was required to impose the enhancement. *United States v. Austin*, 948 F.2d 783, 788 (1st Cir. 1991).

In addition to the lack of necessary specificity in his second argument, the mere fact that a criminal defendant requires the use of an interpreter at trial cannot possibly immunize his testimony from a finding that it was perjurious. Further, Morla-Trinidad does not allege that the interpreter at his trial was incompetent or made any errors in interpretation, nor does he assert that he misunderstood any of the questions put to him during his testimony. His argument, as it stands, would mean that any criminal defendant who testified with the use of an interpreter could never be found to have committed perjury, an assertion that is unsupportable on its face.

Morla-Trinidad's third argument concerning the perjury finding appears to be that, had he known that all of the witnesses against him had at an earlier unspecified time and in an unspecified place, apparently under oath, maintained their innocence of the crimes which they acknowledged at his trial they had committed, he could have used this information to impeach their testimony and the court as a result would not have believed them, thus making it impossible to find that he committed perjury in his own testimony. It is of course well known to this and any court that witnesses at criminal trials who testify pursuant to plea agreements with the government will usually have professed their innocence before entering into the plea agreements. The fact that they may even have done so under oath does not require the court to reject their testimony concerning another defendant.

Morla-Trinidad's presentation on this point is not sufficiently specific to entitle his argument to further consideration, but, even if it were, he could not demonstrate the necessary prejudice under *Strickland* to entitle him to a hearing on his Sixth Amendment claim on this basis.

The final substantive issue raised by Morla-Trinidad is an allegation that the government failed to prove that the substance at issue was crack cocaine, as opposed to some other form of cocaine base, for which the applicable guideline sentencing range is lower, because the government's expert witness "did not test to see whether it was crack cocaine through chemical analysis." Supplement at 7. Morla-Trinidad's assertion that "[t]he law requires the Government to prove through chemical analysis that the substance was actually 'crack cocaine,'" Defendant's Response at [5], is simply incorrect. As the First Circuit has recently noted, "[c]hemical analysis cannot distinguish crack from any other form of cocaine base because crack and all other forms of cocaine base are identical at the molecular level." *United States v. Robinson*, ___ F.3d ___, 1998 WL 219789 (1st Cir. Apr. 9, 1998), at *5. "Crack can be differentiated from other cocaine bases only by appearance and texture, and the applicable guideline, which refers to crack as 'the street name' for a particular form of cocaine base, USSG § 2D1.1(c)(n.(D)), strongly suggests that knowledge of what dealers and users consider to be crack may be a satisfactory experiential base for opinion evidence." *Id.* (upholding testimony of DEA agent that substance was crack).

Here, several witnesses who testified that they were users of crack cocaine also acknowledged that the substance they received from Morla-Trinidad was crack cocaine. E.g., Trial Tr. at 14-15 (Driggers); 46 (Moody); 90 (Poulin); 108 (Schools); and 129 (Lagasse). Nothing further was necessary to establish that the substance at issue was crack cocaine. Accordingly, the fact that Morla-Trinidad's lawyer did not raise this futile issue on appeal does not meet either prong of the

Strickland test.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to vacate, set aside or correct his sentence be **DENIED** without a hearing.[3]

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 26th day of June, 1998.

David M. Cohen
United States Magistrate Judge

[3] In light of the foregoing, I also deny the defendant's request for appointment of counsel.